

**Schilling v Walsh**

2022 NY Slip Op 33104(U)

September 15, 2022

Supreme Court, New York County

Docket Number: Index No. 157678/2020

Judge: Judy H. Kim

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. JUDY H. KIM **PART** **05RCP**

*Justice*

-----X

TARA SCHILLING, DEIRDRE LIVINGSTON,  
  
Plaintiffs,

**INDEX NO.** 157678/2020

**MOTION DATE** 04/19/2022

**MOTION SEQ. NO.** 004

- v -

GARY JOE WALSH, DEBRA DOE, MOUNT SINAI HEALTH  
SYSTEM, CITY OF NEW YORK, NEW YORK CITY POLICE  
DEPARTMENT, POLICE OFFICER TOLLIS, POLICE  
OFFICER BERK,

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146

were read on this motion for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion by defendant Gary Joe Walsh, pursuant to CPLR §§3211(a)(7) and 3212, to dismiss plaintiff’s claims for intentional infliction of emotional distress and negligent infliction of emotional distress as well as all cross-claims against him is denied for the reasons set forth below.

**FACTUAL BACKGROUND**

The complaint alleges, in relevant part, as follows: plaintiffs Tara Schilling and Dierdre Livingston are sisters of Taya Williams, who passed away on December 7, 2019 at Mt. Sinai Hospital (the “Hospital”) (NYSCEF Doc. No. 1 [Compl. at ¶1]). During the week of December 2, 2019, Williams was receiving palliative care at the Hospital (Id. at ¶25). On December 3, 2019, Livingston arrived at the Hospital to see Williams (Id.). After arriving at the hospital, Livingston

video-conferenced Schilling using her phone (Id.). Defendants Walsh and Debra Doe were present in Williams's room when Livingston arrived (Id. at ¶¶26-27). Upon Livingston's arrival, Doe screamed at Livingston to "...get [Tara] off of Facetime!" and repeatedly lunged at Livingston in an effort to end the FaceTime call, eventually pushing and shoving Livingston (Id. at ¶¶28-29).

At the same time, Walsh screamed at Livingston, repeatedly calling her a "bitch" and telling her that Schilling was a "bitch" and stating that he and Doe would "take care of her when she gets here too" (Id. at ¶31). When medical personnel entered the room, Walsh began to yell, "what is her ETA," "how long does she got?" and "when are [you] pulling her off the support?" (Id. at ¶32). Plaintiffs contends that these questions were in reference to Williams' impending death (Id.). Walsh eventually left the hospital room but Doe remained and stated that "Gary has a gun," that Doe was "going to get Gary to shoot both of you" and that he would "take care of [them]" (Id. at ¶35).

Livingston returned the next day, with Tara again present via Facetime (Id. at ¶43). Walsh and Doe were again present, with Walsh displaying a gun holstered on his leg or hip (Id.). At one point, Doe left the room, shouting "Gary" in the hallway and telling him he needed to "take care" of Livingston (Id. at ¶50). Walsh allegedly told Livingston "I will kill you and your bitch sister in California when she gets here!" (Id. at ¶51). Police officers eventually took Walsh, and Livingston to a separate room (Id. at ¶63). While there, Walsh called Livingston a "dumb female" and a "dumb bitch!" and continuously "mocked and tormented" her (Id. at ¶65). Plaintiffs allege that they were traumatized by the foregoing behavior and suffered emotional distress and anxiety as a result (Id. at ¶73).

## PROCEDURAL HISTORY

On November 24, 2020, Walsh moved, pursuant to CPLR §3211(a)(1), (5), and (7) to dismiss the complaint as against him, arguing that the complaint was barred by a release previously executed by plaintiffs and Walsh in connection with plaintiffs' effort to contest Williams's will (NYSCEF Doc. No. 14 [Bruno Affirm. at ¶5]).

In a decision and order dated March 30, 2021, this Court (Hon. Dakota D. Ramseur) rejected that branch of the motion seeking dismissal based on this release, writing:

“... none of [the] aforesaid documents include a release for claims separate from Walsh's role as the executor of plaintiff's estate, including the intentional torts alleged in the complaint... In any event, Walsh's conclusory assertion that he was acting in his capacity as the executor at the relevant times is unsupported”

(NYSCEF Doc. No. 35 [March 30, 2021 Decision and Order] [internal citations omitted]). Justice Ramseur added, however, that:

“... upon review of the complaint, the court determines that plaintiffs failed to state a claim for false imprisonment, since as plaintiffs[sic] did not '[a]llege that [Walsh] intended to confine her and there is nothing in the complaint suggesting that [Walsh] did anything to lead her to believe that she could not leave.' Plaintiffs['] claims as alleging assault must also be dismissed, since the complaint fails to '[a]llege intentional physical conduct [by Walsh] placing the plaintiff in imminent apprehension of harmful contact”

(Id.).

Walsh now moves, pursuant to CPLR §§3211(a)(7) and 3212, to dismiss the complaint's remaining claims against him for negligent and intentional infliction of emotional distress as well as the co-defendants' cross-claims against him.

He argues that dismissal of the negligent infliction of emotional distress and intentional infliction of emotional distress claims is appropriate under CPLR §3211(a)(7) because: (1) plaintiffs have failed to plead that he owed them a duty of care or how he breached that duty; (2) Tara Schilling was not present at the Hospital during the events at issue; and (3) none of his conduct

alleged in the complaint rises to the level of extreme and outrageous conduct required for these causes of action. He further notes that his name does not appear in the cause of action for intentional infliction of emotional distress while all other defendants are specifically referenced, and contends that this omission establishes that this claim is not asserted against him.

Walsh also moves for summary judgment dismissing the complaint as against him, submitting the GML §50-h testimony of plaintiffs and an affidavit disputing the substance of plaintiffs' complaint and GML §50-h testimony (NYSCEF Doc. No. 115 [Walsh Aff.]). As pertinent here, he attests that

“Not once did I ever raise my voice or engage Deirdre (or Tara on the phone) in any shouting match or curse and swear at them. I respected the fact that we were in a hospital where strict quiet had to be maintained. I also knew that Taya wanted me to maintain order and discipline at all times out of respect for the hospital's strict rules, and for the patients and staff. It was only Deirdre Livingston and Tara that were constantly yelling and causing a commotion in Taya's room, and in the hallway outside. I never engaged Deirdre or commented on her abusive conduct out of care and respect for Taya”

(Id. at ¶¶10-11).

In opposition, plaintiffs argue that the branch of Walsh's motion to dismiss the Complaint pursuant to CPLR §3211(a)(7) improperly seeks the same relief sought in his prior motion and is barred by Justice Ramseur's prior decision under the “law of the case” doctrine. Plaintiffs further contend that the branch of Walsh's motion pursuant to CPLR §3212 fails because Walsh has not conclusively rebutted the allegations in their complaint but has instead simply “assert[ed] an entirely alternate explanation of the events alleged in the Complaint, thus creating an issue of credibility which ... warrants a denial of his instant application” (NYSCEF Doc. No. 132 [Rieger Affirm. at ¶22]).

## DISCUSSION

As a threshold matter, the branch of Walsh's motion to dismiss this action pursuant to CPLR §3211(a)(7) is denied, as it violates the "single motion rule" of CPLR §3211(e). Walsh's initial motion was denominated as, among other things, a CPLR §3211(a)(7) motion and while it was predicated principally on the release executed by Walsh and plaintiffs, nothing prevented Walsh from raising these facial sufficiency arguments on that motion (See Landes v Provident Realty Partners II, L.P., 137 AD3d 694 [1st Dept 2016] ["Given that defendants had the full opportunity to raise their current CPLR §3211(a) arguments on their original CPLR §3211(a) motion to dismiss, the IAS court correctly denied the motion as violative of the 'single motion rule'"]). Moreover, Justice Ramseur's decision treated the motion as one pursuant to CPLR §3211(a)(7), addressing the complaint's causes of action on their merits and dismissing certain causes of action as insufficiently pled.

The Court also denies that branch of Walsh's motion pursuant to CPLR §3212, as he has failed to establish his entitlement to summary judgment at this juncture. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]). Walsh has not demonstrated an absence of material issues of fact but devotes his papers to disputing the facts asserted in the complaint and plaintiffs' GML §50-h testimony. Given the wildly divergent versions of events offered by plaintiffs and Walsh, summary judgment is inappropriate at this juncture, particularly in light of the fact that discovery is far from complete (See Solano v Skanska USA Civ. Northeast, Inc., 148 AD3d 619, 619 [1st Dept 2017]).

Finally, that branch of Walsh’s motion to dismiss the cross-claims as against him is also denied. Walsh fails to articulate any specific arguments in support of the dismissal of the cross-claims beyond relying upon those that he raised generally in connection with that branch of his motion seeking the dismissal of the complaint.

In light of the foregoing, it is

**ORDERED** that the motion by defendant Gary Joe Walsh to dismiss this action pursuant to CPLR §3211(a)(7) and 3212 is **DENIED**; and it is further

**ORDERED** that plaintiffs are directed to serve a copy of this decision and order, with notice of entry, upon all defendants within ten days of the date of this decision and order.

This constitutes the decision and order of the Court.



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9/15/2022

DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE